Formi Afta bin Ahmad & Anor v Public Prosecutor

A

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS W-05–218 AND 219 OF 2010
ABDUL MALIK ISHAK, AZAHAR MOHAMED AND ZAWAWI SALLEH JJCA
20 JUNE 2013

B

C

Criminal Procedure — Trial — Inadmissible statement — Whether trial judge wrong to have admitted into evidence curriculum vitae ('CV') of chemist tendered by way of written statement when chemist testified — Whether judge should himself have recorded in writing CV of chemist — Whether serious defects in testimony of chemist rendered convictions and sentences of accused for drug trafficking unsafe — Whether trial judge failed to consider accused did not have exclusive use or possession of car in which drugs were found — Whether judge wrong in finding accused had possession, knowledge, custody and control of drugs — Criminal Procedure Code s 272

D

E

In the instant appeal against their conviction and sentence of death on a charge of trafficking in 38,260g of cannabis, the appellants, inter alia, attacked the infirmity of evidence of the government chemist (SP3) at the trial. They said SP3 not only failed to state her qualifications to the court in order for her evidence to be accepted as expert; she also failed to testify as to when, and from whom, she received the drug exhibits for analysis, what mode of analysis she adopted, and, most importantly, that the exhibits she examined were, in fact, cannabis as defined under s 2 of the Dangerous Drugs Act 1952 ('DDA'). At the time SP3 testified, she had tendered her curriculum vitae ('CV') by way of a written statement. The relevant notes of evidence recorded by the trial judge, as translated, read: 'CV is tendered; it will be typed as part of the notes of evidence'. The appellants contended that the statement containing the CV was inadmissible as it contravened s 272 of the Criminal Procedure Code ('CPC') which required the trial judge to have taken down in writing the notes of the evidence adduced. The appellants submitted that as there was no evidence before the trial court that SP3 was an expert capable of identifying the exhibits as cannabis as defined under s 2 of the DDA it followed that there was no evidence the exhibits produced in court were in fact such dangerous drugs. The appellants also said the trial judge erred in finding that they had possession, knowledge and control of the cannabis. The drugs were found by police in the boot of a car driven by the first appellant ('Formi Afta') when it was stopped by a police party, acting on a tip-off, at a toll plaza. The second appellant ('Jafaruddin') was a passenger in the car. It was the Formi Afta's defence, which his mother, SP4, corroborated, that the car, although belonging to SP4, was freely used by her father, Hj Musa, and other members of her family; that it had

F

G

H

I

not been proven that Formi Afta had exclusive use and possession of the car. Hj Musa in fact used the car as a pirate taxi to, inter alia, send tourists and foreign workers to the airport because there were no buses in the village where they lived. Formi Afta said that on the night in question Hj Musa, because he was feeling tired and unwell, asked him to use the car to pick up his friend, Jafaruddin, from Putrajaya and then to send him to Segambut in Kuala Lumpur for a fee of RM60. It was during that trip that they were stopped and arrested by police. Formi Afta said he did not know Jafaruddin personally; hence the charge that he had common intention with Jafaruddin to traffic in the cannabis was absurd. The appellants said the trial judge failed to properly consider and evaluate the defence's case and erred in holding the prosecution had proven its case against them.

Held, allowing the appeals, quashing the convictions and sentences and acquitting and discharging the appellants:

(1) At the time SP3 testified at the trial on 24 November 2009, the recording of the notes of evidence was governed by s 272 of the CPC which required the High Court judge in all criminal cases to take down in writing the notes of evidence adduced. Only on 1 June 2012 did s 402B(1) of the CPC come into effect permitting a written statement by any person, with the consent of the parties to the proceedings and subject to certain conditions, to be admissible 'as evidence to the like extent as oral evidence to the like effect by that person'. Thus when SP3 tendered her CV by way of a written statement, that statement containing the CV was inadmissible as it went against the requirement of s 272. The CV of SP3 should have been recorded in writing by the trial judge himself – and the appeal record did not show that that was done (see paras 26–28).

(2) The prosecution had to prove that SP3 was an expert. Her evidence showed she never stated her qualifications to show she was an expert in identifying the exhibits to be cannabis as defined under s 2 of the DDA; she did not say when, and from whom she received the exhibits or what type of analysis she carried out with regard to them. Most importantly, she failed to state that the exhibits she analysed were cannabis as defined under s 2 of the DDA. The defects in SP3's evidence meant there was no evidence before the court that the exhibits produced were cannabis within the meaning of s 2 of the DDA. The defects could not be cured by referring to her report because the report was only of corroborative value and not substantive evidence which could fill any gaps in the prosecution's case (see paras 19–20 & 29–31).

(3) The trial judge merely accepted the evidence at face value and never tested it. If he had done so, he would have found that possession had not been proven and that the prosecution failed to establish a prima facie case. The trial judge did not evaluate on a maximum basis the evidence of

SP4 who testified that although the car was hers it was used by her sons and brother and by her father, Hj Musa, who used it as a pirate taxi for many years. At the time of his arrest, Formi Afta was not the sole user of the car. The evidence of SP4 not only put the issue of possession at large but crippled the prosecution's case to such an extent there was no prima facie case established against the appellants (see paras 34, 38, 42, 49, 53 & 79).

(4) It was incumbent on the prosecution to have called the relevant witnesses, particularly Hj Musa, SP4's brother, Shahrul, and her son, Norman, to exclude their having had possession or joint possession of the cannabis found in the car. The trial judge was wrong to have placed the onus on the defence to have called Hj Musa. In fact, he should have invoked adverse inference against the prosecution under s 114(g) of the Evidence Act 1950 for its failure to call him (see paras 50–51 & 60).

(5) There was nothing incredible or improbable about Formi Afta's narration of the events. His evidence was corroborated by the second appellant and supported by the prosecution's evidence in important respects. There was also no evidence and no circumstances from which it could be inferred that the appellants acted in concert either in pursuance of a pre-arranged plan or on the spur of the moment to traffic in the cannabis (see paras 58–59 & 77).

(6) There was no evidence to positively connect the second appellant to the cannabis; no evidence to show he had custody and control either of the motorcar or of the drugs nor evidence that he had put the drugs in the boot of the car. The prosecution failed to establish a prima facie case of possession to warrant the second appellant's defence being called either to a charge of trafficking or to a charge of possession of the cannabis (see paras 64–66).

[Bahasa Malaysia summary

Dalam rayuan ini terhadap sabitan dan hukuman mati mereka atas pertuduhan mengedar 38,260g kanabis, perayu-perayu, antara lain, telah menyerang kelemahan keterangan ahli kimia kerajaan ('SP3') semasa perbicaraan. Mereka berkata SP3 bukan sahaja gagal untuk menyatakan kelayakannya ke mahkamah bagi tujuan keterangannya diterima sebagai pakar; dia juga gagal untuk memberi keterangan berhubung bila, dan daripada siapa, dia menerima ekshibit-ekshibit dadah tersebut untuk analisis, apakah cara di analisis yang digunakan olehnya, dan, paling penting, bahawa ekshibit-ekshibit yang diperiksa olehnya adalah, sebenarnya, kanabis sebagaimana ditafsirkan di bawah s 2 Akta Dadah Berbahaya 1952 ('ADB'). Pada masa SP3 memberi keterangan, dia telah menyerahkan *curriculum vitae*nya ('CV') melalui kenyataan bertulis. Nota-nota keterangan berkaitan yang direkodkan oleh hakim perbicaraan, sebagaimana diterjemahkan, berbunyi: 'CV is tendered; it

will be typed as part of the notes of evidence'. Perayu-perayu berhujah bahawa kenyataan yang mengandungi CV itu tidak boleh diterima masuk kerana ia bertentangan dengan s 272 Kanun Tatacara Jenayah ('KTJ') yang menghendaki hakim perbicaraan menulis nota-nota keterangan yang dikemukakan. Perayu-perayu berhujah bahawa disebabkan tiada keterangan di hadapan mahkamah perbicaraan bahawa SP3 adalah seorang pakar yang berkebolehan untuk mengenal pasti ekshibit-ekshibit tersebut sebagai kanabis sebagaimana ditafsirkan di bawah s 2 ADB ia diikuti bahawa tiada keterangan dan ekshibit-ekshibit yang dikemukakan di mahkamah sebenarnya adalah dadah berbahaya tersebut. Perayu-perayu juga menyatakan hakim perbicaraan terkhilaf dalam mendapati bahawa mereka mempunyai milikan, pengetahuan dan kawalan ke atas kanabis tersebut. Dadah tersebut ditemui oleh polis dalam but kereta yang dipandu oleh perayu pertama ('Formi Afta') apabila ia ditahan oleh sepasukan polis, yang bertindak berdasarkan pemaklumat, di plaza tol. Perayu kedua ('Jafaruddin') adalah penumpang dalam kereta tersebut. Adalah pembelaan Formi Afta, yang mana ibunya SP4, telah memberi sokongan, bahawa kereta tersebut, meskipun dimiliki SP4, adalah bebas untuk digunakan oleh bapanya, Hj Musa, dan ahli keluarganya yang lain; bahawa ia tidak boleh dibuktikan bahawa Formi Afta mempunyai penggunaan dan milikan eksklusif kereta tersebut. Hj Musa sebenarnya telah menggunakan kereta tersebut sebagai teksi haram untuk, antara lain, menghantar pelancong-pelancong dan pekerja-pekerja asing ke lapangan terbang kerana tiada bas dalam kampung di mana mereka tinggal. Formi Afta menyatakan bahawa pada malam yang dipersoalkan itu Hj Musa, kerana dia berasa penat dan tidak sihat, telah memintanya untuk menggunakan kereta tersebut untuk mengambil kawannya, Jafaruddin, daripada Putrajaya dan kemudian menghantarnya ke Segambut di Kuala Lumpur untuk fi RM60. Dalam perjalanan ini mereka telah ditahan dan ditangkap oleh polis. Formi Afta menyatakan dia tidak mengenali Jafaruddin secara peribadi; justeru pertuduhan bahawa dia mempunyai niat bersama dengan Jafaruddin untuk mengedar kanabis tersebut tidak masuk akal. Perayu-perayu tersebut menyatakan hakim perbicaraan telah gagal untuk mempertimbangkan dan menilai sewajarnya kes pembelaan dan terkhilaf dalam memutuskan pendakwaan telah membuktikan kesnya terhadap mereka.

Diputuskan, membenarkan rayuan-rayuan, membatalkan sabitan-sabitan dan hukuman-hukuman dan melepas dan membebaskan perayu-perayu:

(1) Pada masa SP3 memberi keterangan semasa perbicaraan pada 24 November 2009, rakaman nota-nota keterangan adalah menurut s 272 KTJ yang menghendaki hakim Mahkamah Tinggi dalam semua kes jenayah untuk mengambil secara bertulis nota keterangan yang dikemukakan. Hanya pada 1 Jun 2012, s 402B(1) KTJ berkuat kuasa dengan membenarkan kenyataan bertulis oleh mana-mana orang, diterima 'as evidence to the like extent as oral evidence to the like effect by

that person'. Oleh itu apabila SP3 menyerahkan CVnya melalui kenyataan bertulis, bahawa kenyataan mengandungi CV tersebut adalah tidak diterima kerana ia bertentangan dengan keperluan s 272. CV SP3 patut direkodkan secara bertulis oleh hakim perbicaraan sendiri — dan rekod rayuan tidak menunjukkan bahawa ia telah dilakukan (lihat perenggan 26–28).

(2) Pendakwaan telah membuktikan bahawa SP3 adalah seorang pakar. Keterangannya menunjukkan dia tidak pernah menyatakan kelayakannya untuk menunjukkan dia seorang pakar dalam mengenal pasti ekshibit-ekshibit tersebut adalah kanabis sebagaimana ditafsirkan di bawah s 2 ADB; beliau tidak menyatakan bila, dan daripada siapa beliau menerima ekshibit-ekshibit itu atau apakah jenis analisis yang dilakukan olehnya berkaitan ekshibit-ekshibit tersebut. Paling penting, beliau telah gagal untuk menyatakan bahawa ekshibit-ekshibit yang dianalisis olehnya adalah kanabis sebagaimana ditafsirkan di bawah s 2 ADB. Kecacatan dalam keterangan SP3 bermaksud tiada keterangan di hadapan mahkamah bahawa ekshibit-ekshibit yang dikemukakan adalah kanabis dalam maksud s 2 ADB. Kecacatan tersebut tidak boleh dipulihkan dengan merujuk kepada laporan beliau kerana laporan itu hanya mempunyai nilai sokongan dan bukan keterangan substantif yang boleh mengisi apa-apa jurang dalam kes pendakwaan (lihat perenggan 19–20 & 29–31).

(3) Hakim perbicaraan hanya menerima keterangan pada dasarnya dan tidak mengaujinya. Jika beliau berbuat demikian, beliau mungkin akan mendapati bahawa milikan tidak dibuktikan dan bahawa pendakwaan gagal untuk membuktikan kes prima facie. Hakim perbicaraan tidak meneliti secara maksimum keterangan SP4 yang telah memberi keterangan bahawa meskipun kereta tersebut adalah miliknya ia telah digunakan oleh anak lelakinya dan abangnya dan oleh bapanya Hj Musa, yang menggunakannya sebagai teksi haram untuk beberapa tahun. Pada masa tangkapannya, Formi Afta bukan satu-satunya pengguna kereta tersebut. Keterangan SP4 bukan sahaja menimbulkan isu milikan tetapi melemahkan kes pendakwaan sehinggakan tiada kes prima facie dibuktikan terhadap perayu-perayu tersebut (lihat perenggan 34, 38, 42, 49, 53 & 79).

(4) Adalah penting untuk pendakwaan memanggil saksi-saksi relevan, terutamanya Hj Musa, abang SP4, Shahrul, dan anak lelakinya, Norman, untuk mengecualikan mereka daripada mempunyai milikan atau milikan bersama ke atas kanabis yang ditemui dalam kereta tersebut. Hakim perbicaraan terkhilaf kerana meletakkan beban atas pembelaan untuk memanggil Hj Musa. Bahkan, beliau patut menggunakan inferens

bertentangan terhadap pendakwaan di bawah s 114(g) Akta Keterangan 1950 kerana kegagalannya untuk memanggilnya (lihat perenggan 50–51 & 61).

(5) Tiada apa-apa yang mustahil atau tidak munasabah tentang penceritaan kejadian oleh Formi Afta. Keterangannya telah disokong oleh perayu kedua dan disokong oleh keterangan pendakwaan dalam aspek yang penting. Juga tiada keterangan dan tiada keadaan yang mana ia boleh membuat inferens bahawa perayu-perayu tersebut telah bertindak sekali sama ada dalam perancangan yang telah diatur terlebih dahulu atau secara tiba-tiba untuk mengedar kanabis (lihat perenggan 58–59 & 77).

(6) Tiada keterangan untuk mengaitkan secara positif perayu kedua dengan kanabis tersebut, tiada keterangan menunjukkan dia mempunyai jagaan dan kawalan sama ada terhadap kereta atau dadah tersebut mahupun keterangan bahawa dia telah meletakkan dadah tersebut dalam but kereta. Pendakwaan gagal untuk membuktikan kes prima facie tentang milikan untuk mewajarkan pembelaan perayu kedua dipanggil sama ada terhadap suatu pertuduhan pengedaran atau terhadap suatu pertuduhan milikan kanabis (lihat perenggan 64–66).]

Notes

For a case on inadmissible statement, see 5(2) *Mallal's Digest* (4th Ed, 2012 Reissue) para 5402.

Cases referred to

Abdullah Zawawi bin Yusoff v PP [1993] 3 MLJ 1; [1993] 4 CLJ 1, SC (refd)
Director of Public Prosecutions v Brooks [1974] 2 All ER 840, PC (refd)
Francis Antonysamy v PP [2005] 2 CLJ 481, FC (refd)
Hari Ram v State of Uttar Pradesh [2004] 3 LRI 523, SC (refd)
Leong Bon Huat v PP [1993] 3 MLJ 11, SC (refd)
Liew Siew & Anor v PP [1969] 2 MLJ 232 (refd)
Mahbub Shah v Emperor AIR 1945 PC 118, PC (refd)
Juraimi bin Husin v PP; Mohd Affandi bin Abdul Rahman & Anor v PP [1998] 1 MLJ 537, CA (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273, FC (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705; [2000] 4 CLJ 649, HC (refd)
PP v Kasmin bin Soeb [1974] 1 MLJ 230 (refd)
Queen, The v Woodrow (1846) 16 LJ MC 122 (refd)
Suresh and another v State of Uttar Pradesh AIR 2001 SC 1344, SC (refd)
Tai Chai Keh v PP [1948–1949] Supp MLJ 105b (refd)
Tan Foo Su v PP [1967] 2 MLJ 19 (refd)
Wong Chop Saow v PP [1965] 1 MLJ 247 (folld)
Yee Ya Mang v PP [1972] 1 MLJ 120 (refd)

Legislation referred to

Criminal Procedure Code ss 272, 402B(1), 422
Courts of Judicature Act 1964 s 60(1)
Dangerous Drugs Act 1952 ss 2, 39B(1)(a), First Schedule
Dangerous Drugs Act [JM] s 7(c)
Evidence Act 1950 ss 45, 114(g)
Immigration Act 1959/63
Penal Code s 34

Appeal from: Criminal Trial No 45–31 of 2006 (High Court, Kuala Lumpur)

Hisyam Teh Poh Teik (Salim Bashir with him) (Salim Bashir Ruswiza & Co) for the first appellant.
S Selvi (Gooi & Azura) for the second appellant.
Tengku Amir Zaki bin Tengku Abdul Rahman (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] After a full trial, both the appellants were found guilty of trafficking in 38,260g of cannabis, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') and punishable under s 39B(1)(a) of the DDA read with s 34 of the Penal Code and they were convicted and sentenced to death. The offence was said to have been committed on 1 August 2005 at about 2.30am at 'Kawasan Plaza Tol Jalan Duta, dalam Daerah Sentul, dalam Bandaraya Kuala Lumpur, Wilayah Persekutuan'.

[2] Aggrieved, both the appellants filed an appeal to this court.

THE CASE FOR THE PROSECUTION

[3] On 31 July 2005, after Chief Inspector Mazli bin Abd Aziz ('SP6') was informed by Superintendent Tang Yoot Leng about a drug trafficking activity that would take place that night at the Jalan Duta toll area, SP6 assembled his police personnel at about 9pm and briefed them about the drug trafficking operation to be held at the Jalan Duta toll area.

[4] On 31 July 2005 at about 12 midnight, SP6 led his police personnel to Jalan Duta toll and they arrived there at about 2am on 1 August 2005. SP6 and his police personnel took up ambush positions and they kept vigil. About 30 minutes later, SP6 saw a metallic gold coloured Proton Wira motorcar bearing registration number WDE 2748 — the target motorcar ('the Proton Wira

motorcar'), approaching the Jalan Duta toll. SP6 instructed Detective Sergeant 82473 Abdul Halim bin Ahmad ('SP8'), who was then driving an unmarked police motorcar, to block the path of the Proton Wira motorcar from the front side. SP8 complied and the driver of the Proton Wira motorcar had no choice but to stop the said motorcar.

[5] SP6 swung into action and he approached the driver of the Proton Wira motorcar and introduced himself as a police officer. According to SP6, the driver of the Proton Wira motorcar reversed the said motorcar and collided into another unmarked police motorcar (with Inspector Balasubramaniam on board) who had blocked the path of the Proton Wira motorcar from the rear on the instruction of SP6.

[6] According to SP6, there were two persons inside the Proton Wira motorcar. The driver of the Proton Wira motorcar was identified as the first appellant while the passenger who sat in the front left of the said motorcar was identified as the second appellant. SP6 arrested the first appellant and, according to SP6, the second appellant got out of the Proton Wira motorcar and tried to run away but he was eventually arrested by Chief Inspector Balasubramaniam.

[7] SP6 physically examined both the appellants and nothing incriminating was found on them. SP6 then proceeded to examine the boot of the Proton Wira motorcar, in the presence of both the appellants, and he found four plastic bags containing 44 blocks of compressed items suspected to be *ganja*.

[8] Both the appellants together with the Proton Wira motorcar were brought to the Sentul Police Station on 1 August 2005 at about 7–8am, after SP6 and the police personnel accompanied by both the appellants went to three different places for purposes of further investigation to trace the purchasers of the drugs.

[9] On 1 August 2005 at 1.30pm, after SP6 had marked the exhibits, he handed them together with both the appellants to ASP Som Chai a/l Din Lian ('SP9'), the investigating officer of the case, at the Kuala Lumpur Police Station.

[10] The prosecution also led evidence that SP9 sent the exhibits for analysis to the government chemist by the name of Puan Maimonah bt Sulaiman ('SP3') and she confirmed that the exhibits were cannabis weighing 38,260g

within the meaning of s 2 of the DDA.

THE CASE FOR THE DEFENCE

The testimony of the first appellant under oath

[11] His testimony went along the following lines:

(a) that on 30 July 2005 at about 9.30pm, his grandfather by the name of Hj Musa bin Hj Yusof ('Hj Musa') requested him to fetch the second appellant in front of the provision shop at Kampung Limau Manis, Putrajaya and then send the second appellant to Segambut, Kuala Lumpur. The reason for this request was because his grandfather, at that time, was feeling tired;

(b) he then drove the Proton Wira motorcar and fetched the second appellant at Kampung Limau Manis, Putrajaya at about 9.45pm;

(c) he described his grandfather as a 'kereta sapu' driver;

(d) he said that the Proton Wira motorcar belonged to his mother by the name of Siti Norini bt Musa ('SP4') and that she left the said motorcar in the custody of his grandfather so that it could be used by family members to send his younger brother to the hospital as well as to allow his grandfather to use the said motorcar as a 'kereta sapu';

(e) he said that he used to see the second appellant three to four times in his grandfather's house but he did not know the second appellant that well. He said that he could not recognise the second appellant that well. And his grandfather told him that the second appellant was waiting in front of the provision shop;

(f) he said that when the second appellant boarded the Proton Wira motorcar, the second appellant did not carry anything;

(g) he said that while seated in the Proton Wira motorcar, the second appellant merely requested to be sent to the destination which he requested;

(h) he said that on the way to Segambut, Kuala Lumpur, he stopped several times to eat, to top up the petrol, and finally at the Jalan Duta toll to ease his bladder and to wash his face;

(i) he said that as he drove the Proton Wira motorcar out of the R&R near the Jalan Duta toll, a Proton Waja motorcar suddenly came from the frontal direction and blocked his path and prevented him from driving the said motorcar any further;

(j) thereafter, a group of men alighted from the Proton Waja motorcar and rushed towards the Proton Wira motorcar that was driven by him. At that time, the situation was tense. He said that the group of men pulled him out of the Proton Wira motorcar and likewise, the second appellant shared the same fate and was also assaulted;

(k) he said that both he and the second appellant neither attempted to run away nor did he reverse the Proton Wira motorcar which collided against another person's motorcar;

(l) he said that after he was pulled out of the Proton Wira motorcar and assaulted, the police then physically examined his person and nothing incriminating was found. The police also checked the interior of the Proton Wira motorcar and nothing incriminating was found. He said that the police then proceeded to check the boot of the Proton Wira motorcar and they found a few plastic packages and they showed them to him;

(m) he said that the police questioned him in regard to the contents of the packages and he replied that he did not know their contents. He said that he then led the police party to Desa Putra, Kajang, the house of his grandfather and there, the police party headed by SP6, conducted a thorough search and nothing incriminating was found in his grandfather's house. At that time, his grandfather, grandmother and Norman were inside the said house. He said that the second appellant was not brought inside his grandfather's house because he was taken elsewhere in another vehicle;

(n) he said that after Desa Putra, Kajang, the police took him to Kampung Limau Manis, Putrajaya, and there, the second appellant was taken out of the motorcar and brought inside a house;

(o) from Kampung Limau Manis, Putrajaya, the first appellant was brought to Puchong, Selangor by the police to meet the first appellant's friend and there, the first appellant admitted to SP6 that he used to visit his friend's house but on that day, SP6 was told by the first appellant's other friends that this particular friend of his was no longer staying there;

(p) from there, the first appellant said that he was brought to the Sentul Police Station at about 6am and by that time, the exh ('P55A–D') were not shown to the first appellant yet;

(q) he said that at the Jalan Duta toll, only the black plastic bags were shown to him but not their contents. He said that he never saw those 'things' when he was driving the Proton Wira motorcar, he did not know who the owners of those 'things' were and he did not know who had put the black plastic bags inside the boot of the motorcar which he drove that night with the second appellant;

(r) he categorically said that he did not try to run away and he had possession of the Proton Wira motorcar approximately at 9.45pm to approximately at 12 midnight on 31 July 2005 when he was arrested. And he said that the said motorcar was driven by his grandfather on 31 July 2005 from afternoon till 7pm;

(s) he said that his younger brother used to drive the Proton Wira motorcar and, at times, his grandfather would rent out the said motorcar to other people; and

(t) when he was cross-examined by learned counsel acting for the second appellant, he said that the second appellant often rented his grandfather's motorcar and the last occasion was a week before the incident.

The testimony of the second appellant under oath

[12] He testified as follows:

(a) that on 31 July 2005, he lived in Kampung Limau Manis, Putrajaya, and he worked as a construction labourer;

(b) on that date, he telephoned Hj Musa and requested for transportation to send him to Segambut, Kuala Lumpur. However, it was the first appellant who came to fetch him;

(c) before the incident, he did not know the first appellant but used to see him (the latter) at Hj Musa's house;

(d) on the night in question, when the police pounced on them, he did not try to run away because he did not know what was kept in the boot of the Proton Wira motorcar;

(e) he categorically said that he did not see those 'things' (exh 'P55A–D') inside the Proton Wira motorcar which he boarded and he too said that he did not see the first appellant put those 'things' inside the said motorcar;

(f) he also said that the first appellant did not reverse the Proton Wira motorcar when the first appellant was arrested by the police; and

(g) when he was cross-examined by the learned deputy public prosecutor, he testified that it was Hj Musa who directed the first appellant to fetch and send the second appellant to Segambut, Kuala Lumpur. He said that once he was seated inside the Proton Wira motorcar, he struck a conversation with the first appellant.

[13] He denied, when cross-examined, in regard to the following matters:

(a) that it was he who telephoned the first appellant;

(b) that he met the first appellant for the purpose of trafficking the drugs;

(c) that he and the first appellant were friends;

(d) that he attempted to run away when confronted by the police;

(e) that he and the first appellant knew about the drugs and they were the ones who had put the drugs inside the Proton Wira motorcar; and

(f) that the drugs belonged to the second appellant and the first appellant and that they were the ones who had put the drugs inside the Proton Wira motorcar in order to sell them.

ANALYSIS

Arguments advanced for the first appellant

[14] For convenience, we will make reference to the issues advanced by Mr Hisham Teh Poh Teik who acted for the first appellant. He canvassed the following salient issues:

(a) that the High Court judge misdirected himself when he ruled that there was a prima facie case against the first appellant. In this connection, the High Court judge erred when he failed to consider that:

(i) the chemist's evidence of SP3 was totally inadequate; and

(ii) the element of possession was not proven at the close of the prosecution's case;

(b) that the High Court judge failed to appreciate the defence case.

NO PRIMA FACIE CASE

[15] The backbone of the prosecution's case for an offence of trafficking in 'cannabis' under the DDA is the evidence of the government chemist. In this case, it would be the evidence of SP3. It is an essential requirement under the law that the subject matter of the offence must be proved to be a 'dangerous drug' within the meaning of s 2 of the DDA. That section enacts as follows:

> 'dangerous drug' means any drug or substance which is for the time being comprised in the First Schedule.

[16] The First Schedule to the DDA is divided into five parts, from Part I to Part V, itemising the list of dangerous drugs and 'cannabis' falls under Part II.

[17] The expertise of SP3 should be established by the prosecution, bearing in mind that SP3 is called to give evidence in relation to her special knowledge which would assist the court. As an expert, SP3 is not required to give an opinion on matters outside her field of expertise.

[18] SP3 is asked to identify the subject matter of the charge to be 'cannabis', a dangerous drug within the meaning of s 2 of the DDA. At the very outset, the steps listed by Hashim J in *Wong Chop Saow v Public Prosecutor* [1965] 1 MLJ 247 should be religiously adopted. There, at p 247, His Lordship gave this salutary advice:

> May I, with respect, suggest that to avoid confusion the expert witness should give his evidence as follows. He should first state his qualifications as an expert. He should then state that he has given evidence as an expert in such cases and that his evidence has been accepted by the courts.

[19] So, the basis for the reception of expert opinion under s 45 of the Evidence Act 1950 must be laid by the prosecution. Bluntly put, the prosecution must prove that SP3, as a government chemist, was an expert when she gave evidence at the material time.

[20] Here, the evidence of SP3 commences from p 9 of the appeal record at Vol 1. A scrutiny of SP3's evidence shows that her evidence suffers from the following infirmities:

(a) she never stated her qualifications. In order to qualify as an expert in identifying the plant material as cannabis as defined in s 2 of the DDA, she must state her qualifications and this was not done;

(b) she did not say when she received the exhibits and from whom she received the exhibits.

(c) she did not testify as to the types of analysis adopted by her in regard to the plant material as required by the Supreme Court in the case of *Leong Bon Huat v Public Prosecutor* [1993] 3 MLJ 11 (SC); and

(d) and, most importantly, she did not say that the exhibits which she analysed were 'cannabis' as defined under s 2 of the DDA.

[21] It is because of these infirmities that the prosecution sought for the additional appeal records and we granted it and they were accordingly marked as appeal records, Vols 4–6.

[22] Now, the contents of the appeal record at Vol 4 containing the typewritten notes of evidence of SP3 are the same with the typewritten notes of evidence of SP3 in the appeal record at Vol 1. It starts from pp 9–24.

[23] The appeal record at Vol 5 is the typewritten notes of evidence of SP3 where her qualifications and her analysis were stated.

[24] The appeal record at Vol 6 is in fact a combination of the appeal record at Vol 1 and the appeal record at Vol 5. There was certainly confusion as regards the notes of evidence of SP3 and the defence applied to us to have the handwritten notes of evidence recorded by the High Court judge in regard to the evidence of SP3 only. We allowed the defence application and we now have before us the additional appeal record at Vol 7 and it is the handwritten notes of evidence of the High Court judge pertaining to the evidence of SP3.

[25] In the additional appeal record at Vol 7, at p 235, just after SP3 had affirmed and stated in the Malay language, there is a paragraph which reads as follows:

> Soalan utama:
>
> CV dikemukakan, ia akan ditaipkan sebagai sebahagian daripada Nota Keterangan.
>
> (The translation reads as follows:
>
> Examination-in-chief:
>
> CV is tendered, it will be typed as part of the Notes of evidence.)

[26] SP3 gave evidence on 24 November 2009. On that date, recording of the notes of evidence is governed by s 272 of the Criminal Procedure Code ('CPC') and that section enacts as follows:

> Judge to take notes of evidence
>
> 272 In all criminal cases tried before the High Court the Judge shall take down in writing notes of the evidence adduced.

[27] Thus, when SP3 gave evidence on 24 November 2009 and tendered her curriculum vitae ('CV') by way of a written statement, that written statement containing the CV of SP3 is inadmissible in law as it goes against the requirement of s 272 of the CPC. The CV of SP3 should have been recorded in writing by the High Court judge himself and it is not reflected at p 235 of the appeal record at Vol 7.

[28] The amendment in relation to a written statement came into effect on 1 June 2012 with the introduction of s 402B(1) of the CPC which enacts as follows:

Proof by written statement

402B(1) In any criminal proceedings, a written statement by any person shall, with the consent of the parties to the proceedings and subject to the conditions contained in subsection (2), be admissible as evidence to the like extent as oral evidence to the like effect by that person.

[29] On 24 November 2009, when SP3 gave her evidence, there is no s 402B(1) of the CPC as yet. That being the case, the typewritten statements of SP3 in the appeal records at Vols 5–6 are inadmissible in law. It is because of this infirmity that there is no evidence before this court that the exhibits produced were 'cannabis', a dangerous drug, under s 2 of the DDA. In our judgment, this infirmity impinged on the prosecution's case. The end result would be that the convictions against the first appellant as well as the second appellant cannot stand and must be set aside.

[30] The defect in SP3's evidence cannot be cured by referring to the chemist report in exh 'P9' that was prepared by SP3 as seen at pp 4–7 of the appeal record at Vol 3. The authority for this proposition is the Federal Court case of *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 (FC) where Chong Siew Fai CJ (Sabah and Sarawak) speaking for the Federal Court had this to say at p 284 of the report:

(2) from the appeal record it is obvious that PW3 gave substantive evidence in his oral testimony in court and that the report (exh P11) was merely tendered as one of the items handed over by him to PW7; and (3) that the chemist report, even assuming that it was not tendered for the purpose of its being identified as an item handed to PW7, was no more than corroborative evidence affirming PW3's evidence that he had examined and analysed the suspected plant materials and found them to be cannabis under the Dangerous Drugs Act 1952.

[31] What this amounts to is this. That the chemist report prepared by SP3 is of corroborative value and it is not meant to fill any gaps in the prosecution's case as it is not a substantive evidence. This simple proposition of the law is further illustrated by the Federal Court case of *Francis Antonysamy v Public Prosecutor* [2005] 2 CLJ 481 (FC), where Augustine Paul JCA writing for the Federal Court had this to say at pp 492–493 of the report:

Corroborative evidence is only admissible to support testimony that has already been given. It is not admissible to supplement such testimony. In *Yap Ee Kong & Anor v PP* [1981] 1 MLJ 144 this court adopted *Director (sic)(of) Public Prosecution v Hester* [1973] AC 296 where it was held that the purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible. It was further held that if the evidence to be corroborated is found to be uninspiring and unacceptable then corroboration would be futile and unnecessary.

[32] The evidence of SP3 recorded in writing by the High Court judge pursuant to s 272 of the CPC and as reflected at the additional appeal record at Vol 7 do not inspire confidence. The High Court judge failed to appreciate that the evidence of SP3 is defective in that there is no evidence to establish the expertise of SP3 and SP3 also did not say that the exhibits she analysed were cannabis as defined in s 2 of the DDA. SP3 also did not explain the types of analysis conducted by her.

THE ELEMENT OF POSSESSION WAS NOT PROVEN AT THE CLOSE OF THE PROSECUTION'S CASE

[33] The High Court judge misdirected himself when he did not subject the evidence adduced by the prosecution to a maximum evaluation by assessing the credibility and reliability of the evidence of the witnesses. The infirmities, gaps and contradictions that affected the main ingredients must be scrutinised with a tooth comb and if there are doubts, it must be interpreted in favour of the appellant. The presence of prejudicial evidence must be precluded and only the best evidence should be accepted.

[34] The High Court judge merely accepted the evidence at face value and never tested it. If he had done so, he would find that possession was not proven and the prosecution failed to establish a prima facie case. Sharma J in *Yee Ya Mang v Public Prosecutor* [1972] 1 MLJ 120, defined 'possession' in this way (see p 120 of the report):

> … implies a physical capacity to deal with the thing as one likes to the exclusion of everyone and a determination to exercise that physical power on one's own behalf. It implies dominion and consciousness in the mind of the person having 'possession' that he not only has such dominion but also that he can exercise it.

[35] It goes without saying that knowledge is an essential ingredient of possession. In *The Queen v Woodrow* (1846) 16 LJ MC 122 at p 127, Pollock CB had this to say, 'indeed, a man can hardly be said to be in possession of anything without knowing it'.

[36] Lord Diplock in *Director of Public Prosecutions v Brooks* [1974] 2 All ER 840 (PC), construed the word 'possession' in the context of s 7(c) of the Dangerous Drugs Act of Jamaica by applying the common sense approach that one is said to be in possession when one has in one's possession to one's own knowledge, physically in one's custody or under one's physical control.

[37] Simply put, you must have some degree of custody or control before you are said to have knowledge of that custody and control. And together, they constitute possession under the DDA.

[38] We will now look at the evidence adduced. What is apparent is that the first appellant was not the sole user of the Proton Wira motorcar. The registered owner of the said motorcar was SP4 — the mother of the first appellant. Her evidence shows that the Proton Wira motorcar was also used by her father by the name of Hj Musa as a pirate taxi. She was also categorical when she said that other family members could also use the said motorcar.

[39] The evidence of SP4 merits reproduction in extenso. At p 25 of the appeal record at Vol 1, in examination-in-chief, SP4 declared to the whole world at large, so to speak, that anyone can use her Proton Wira motorcar. This was what she said:

> Saya ada sebuah motokar Proton Wira, no. plate WDE 2748. Saya yang beli kereta itu hampir 6 tahun, saya rasa dalam tahun 2003. Dalam tahun 2005, saya masa itu saya balik rumah emak di Desa Putra, kereta tinggal di rumah emak saya, sesiapa boleh gunakan motokar itu.
>
> Pada 1.8.2005 saya berada di Negeri Sembilan; iaitu di Felda Palong 6, saya balik ke rumah saya di Felda. Kereta itu ditinggal di rumah emak saya, dan sesiapa boleh gunakan motokar itu untuk hantar anak saya ke hospital, iaitu anak istimewa saya yang tinggal dengan datuk dia dekat Hospital Putrajaya. Datuk itu maksudnya yang tinggal di rumah di mana kereta saya tinggalkan.

[40] At p 26 of the appeal record at Vol 1, again under examination-in-chief, SP4 testified:

> Kereta itu memang untuk anak-anak saya dan family, dia memang ada gunakan kereta itu untuk hantar adik dia ke Hospital Putrajaya.

[41] At p 28 of the appeal record at Vol 1, under cross-examination, SP4 said:

> Alasan saya tinggal di situ untuk memudahkan family saya bawa anak saya ke hospital, masa itu saya berada di Felda Palong, Negeri Sembilan, tarikh dalam 17hb. Julai.

[42] Continuing on the same page, SP4 testified that her father — Hj Musa, a pirate taxi driver, also used her Proton Wira motorcar. She elaborated further that her father also used the said motorcar to carry tourists and workers to the airport. Her other son, by the name of Naja Norman, also used the said motorcar. Her testimony went like this (see her cross-examination at p 28 of the appeal record at Vol 1):

> S: Ayah awak pun guna motokar WDE 2748?
>
> J: Ya.
>
> S: Dia bekerja sebagai pembawa kereta sapu?

A J: Ya.

S: Ada masanya dia gunakan motokar WDE 2748 untuk bawa pelancung-pelancung, pekerja-pekerja import ke airport?

J: Ya.

B S: Naja Norman juga pakai kereta WDE 2748?

J: Ya.

[43] Again, under cross-examination at p 29 of the appeal record at Vol 1, she C testified that even her younger brother, by the name of Shahrul, often used the Proton Wira motorcar. This was what she said:

S: Ada seorang adik puan nama Shahrul selalu guna motokar WDE 2748 ini?

J: Ya.

D

[44] To a question, under cross-examination at the same page, whether she knew that the first appellant had used the Proton Wira motorcar two hours after the said motorcar was used by her father, she replied in the negative. This E was the question that was posed to her and her answer thereto:

S: Kamu tahu atau tidak bahawa OKT ambil kereta untuk dipakai, 2 jam selepas atuknya gunakan kereta dan tinggal kat rumah?

J: Tak tahu.

F

[45] Under cross-examination at p 31 of the appeal record at Vol 1, she explained that her father has been a pirate taxi driver for many years and she reiterated that her father sent foreign workers to the airport because there were no buses in the *kampung*. The exchange went like this:

G

S: Berapa lama Hj Musa bekerja sebagai pembawa kereta sapu?

J: Berbelas tahun.

S: Dia juga ada ambil pekerja-pekerja asing untuk dibawa ke airport?

H J: Ya.

S: Macam mana awak tahu?

J: Sebab kampung saya tiada bas, dia selalu hantar orang ke mana-mana.

I

[46] Finally, under cross-examination at p 32 of the appeal record at Vol 1, she emphasised that those people used her Proton Wira motorcar:

S: Selepas OKT ditangkap, ada awak bertanyakan apa-apa kepada Shahrul tentang kereta ini?

J: Tak tanya kepada ayah saya dan anak-anak, tapi dia orang memang selalu pakai kereta ini.

[47] Under re-examination at p 32 of the appeal record at Vol 1, she named the persons who used to drive her Proton Wira motorcar. This was what she said:

Yang pernah guna motokar itu, Hj Musa, Shahrul, OKT dan Norman.

[48] Finally, under re-examination at p 33 of the appeal record at Vol 1, she said that her father drove the Proton Wira motorcar and the Kancil motorcar as pirate taxis. This was what she said:

Hj Musa guna motokar ini dan Kancil untuk private sapu.

[49] The evidence of SP4 was certainly thought-provoking. But the High Court judge did not evaluate on a maximum basis the evidence of SP4. Drugs were found in the boot of her Proton Wira motorcar, yet the High Court judge did not evaluate her evidence with a fine toothcomb. At the time of his arrest, the first appellant was not the sole user of the said motorcar. The first appellant's grandfather by the name of Hj Musa used the said motorcar as a pirate taxi. There were others who had access to the said motorcar. But these were not appreciated by the High Court judge.

[50] In our judgment, it is incumbent on the prosecution to call these witnesses particularly Hj Musa, Shahrul and Norman in order to exclude them from having possession or joint possession of the cannabis found in the boot of the Proton Wira motorcar. Hj Musa was offered but not called by the defence. And the High Court judge placed the onus on the defence to call Hj Musa. This was what His Lordship said at p 171 of the appeal record at Vol 1:

83 Ditinjau daripada keterangan-keterangan kedua-dua pihak setelah diletak kes pendakwaan dan kes pembelaan sebelah menyebelah, maka saya berpendapat, adalah menjadi tugas pembelaan untuk memanggil Hj. Musa memberi keterangan bagi menyokong versi mereka mengenai peranan Hj. Musa dan kereta WDE 2748, khususnya pada malam itu yang turut melibatkan tertuduh kedua juga.

[51] This is certainly wrong. It is a serious misdirection. It is the prerogative of the defence to adopt a particular line of defence or to call a particular witness. With respect, no adverse comment should be made by the High Court judge for the non-calling of Hj Musa by the defence (*Tan Foo Su v Public Prosecutor* [1967] 2 MLJ 19; and *Liew Siew & Anor v Public Prosecutor* [1969] 2 MLJ 232).

[52] The High Court judge criticised the evidence of SP4 — the prosecution witness, and doubted the version of SP4 that Hj Musa also used the Proton Wira motorcar on that fateful day. At p 171 of the appeal record at Vol 1, this was what His Lordship said:

> 82 Manakala dari keterangan kes pendakwaan, nama Hj. Musa dan peranannya hanya melalui SP4, yang tidak pasti samada benar atau tidak Hj. Musa ada menggunakan kereta itu pada hari kejadian?

[53] Taken in its correct perspective, the evidence of SP4 put the issue of possession at large. The Proton Wira motorcar was accessible to others and this was also conceded by SP9 — the investigating officer of the case. At p 83 of the appeal record at Vol 1, SP9 was cross-examined and the exchange was in favour of both the appellants:

> S: Adakah awak setuju kereta itu turut dipakai oleh orang lain termasuklah atuknya?
>
> J: Ya.

THE FAILURE TO APPRECIATE THE DEFENCE OF THE FIRST APPELLANT

[54] The defence of the first appellant was rather simple. That he has no knowledge of the cannabis in the boot of the Proton Wira motorcar as he was not the sole or exclusive user of the said motorcar. Although the said motorcar was registered in his mother's name — SP4, yet the said motorcar was left in the house of SP4's parents, and that would be the grandparents of the first appellant. It was the testimony of SP4 that the said motorcar could be driven by all members of the family. Of significance to note would be the fact that the first appellant's grandfather, Hj Musa, had been using the said motorcar as a 'kereta sapu' to ferry passengers, tourists and foreign workers to and fro the airport.

[55] The first appellant explained in his defence as to why he was driving the Proton Wira motorcar on that fateful day. He testified that at about 9.30pm on the night in question, he was requested by his grandfather, Hj Musa, to use the Proton Wira motorcar to pick up the second appellant from Kampung Limau Manis, Putrajaya to send him to Segambut, Kuala Lumpur. It seems that the second appellant was a frequent client of Hj Musa and the latter had been using the said motorcar as a 'kereta sapu' for tens of years.

[56] The first appellant testified that on the night of 31 July 2005, his grandfather returned home at about 7pm and his grandfather received a telephone call from the second appellant who required transport. Since his

grandfather was tired and unwell, the first appellant was requested by his grandfather to fetch the second appellant and thereafter, to collect RM60 from the second appellant.

[57] The first appellant then gave a detailed account commencing from the time he picked up the second appellant and the surrounding circumstances that eventually led to the Proton Wira motorcar being blocked and culminating in the arrest of both the appellants.

[58] The evidence of the first appellant was corroborated by the evidence of the second appellant who confirmed that the second appellant telephoned Hj Musa and requested to be sent to Segambut, Kuala Lumpur.

[59] In our judgment, there is nothing incredible or improbable about the first appellant's narration of the events. The first appellant's version was supported by the prosecution's own evidence in regard to the following important aspects of the case:

(a) the fact that the first appellant is not the owner of the Proton Wira motorcar was supported by the evidence of SP4; and

(b) the fact that the first appellant is not the sole or exclusive user of the Proton Wira motorcar was supported by the evidence of SP4.

[60] In our judgment, at the end of the defence case, the High Court judge should have invoked the presumption under s 114(g) of the Evidence Act 1950 against the prosecution for its failure to call Hj Musa (*Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649).

[61] There is a passage appearing in the judgment of the Supreme Court in *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1; [1993] 4 CLJ 1 that merits reproduction. It is this (see p 7 (MLJ); p 4 (CLJ) of the report):

> With respect, given the fact that this was a case where the police were acting on a tip off undoubtedly by an informer, who might have been a paid informer, and the further fact that the house was still under construction, the onus was not on the defence to prove possibility of access by others but on the prosecution to exclude such possibility.

[62] Here, the prosecution, in an attempt to exclude such a possibility, had called SP4. She gave damning evidence against the prosecution. Her testimony favoured the defence. She testified that others had access to the Proton Wira motorcar.

Arguments advanced for the second appellant

No prima facie case

[63] It was submitted that the High Court judge misdirected himself when he held that the prosecution had proved a prima facie case against the second appellant.

[64] Puan S Selvi for the second appellant emphasised on the evidence adduced by the prosecution to show that there was no prima facie case established by the prosecution at the close of the prosecution's case. Now, according to the evidence led by the prosecution, the second appellant was a mere passenger in the Proton Wira motorcar and, at the time of the arrest, he was seated on the front left passenger's side. The drugs were found in the boot of the said motorcar. The second appellant, on the facts, neither had exclusive use of the Proton Wira motorcar nor was he the owner nor the driver of the said motorcar. It bears repetition to say that the Proton Wira motorcar belonged to SP4, the mother of the first appellant. There was neither evidence led to positively connect the second appellant to the drugs nor evidence that he had the custody and control of the drugs.

[65] It is our judgment that there was no evidence that the second appellant had custody and control of the Proton Wira motorcar prior to his arrest. And there was no evidence that the second appellant had the opportunity or the ability to access the drugs in the boot of the said motorcar and the power of disposal of the drugs in question. There was no evidence that it was the second appellant who had put the drugs in the boot of the said motorcar. There was also no evidence to show that he had opened the boot of the said motorcar. The drugs were not so situated near him that it could be inferred that he had access to it.

[66] It is our judgment that the prosecution had failed to establish a prima facie case of possession to warrant the High Court judge to call upon the second appellant to enter his defence either on a charge of trafficking in cannabis or on a charge of possession of the cannabis.

NO ELEMENT OF POSSESSION AT THE CLOSE OF THE PROSECUTION'S CASE

[67] At its highest, even if custody and control of the drugs has been proven against the second appellant, it was argued that the High Court judge has

misdirected himself when he held that the prosecution has proven that the second appellant had knowledge of the drugs in the boot of the Proton Wira motorcar.

[68] We reiterate that there was no evidence that the second appellant had opened the boot or kept the drugs in the boot. The first appellant confirmed that when the second appellant boarded the Proton Wira motorcar, the second appellant did not carry anything. And even if the prosecution's version is true that the second appellant attempted to run away, that alleged act of flight by the second appellant is a neutral act. It raises many inferences. It must be recalled to mind that the second appellant was a holder of UNHR card and he was charged for an offence under the Immigration Act. At the material time of arrest by SP6 and his police party, the second appellant was not carrying any documents with him and it could reasonably be inferred that he tried to run because he did not want to be caught for an offence under the Immigration Act 1959/63. Since the facts adduced by the prosecutor gave rise to other inferences, the inference most favourable to the second appellant should be adopted and that would be that the second appellant had no knowledge of the drugs in the boot of the Proton Wira motorcar (*Tai Chai Keh v Public Prosecutor* [1948-1949] supp MLJ 105b; and *Public Prosecutor v Kasmin bin Soeb* [1974] 1 MLJ 230).

NO COMMON INTENTION OF BOTH THE APPELLANTS

[69] Both the appellants were said to have acted with a common intention pursuant to s 34 of the Penal Code. We will deal with this issue by stating that the High Court judge erred in law and in fact when he held that common intention had been proven contrary to the evidence adduced.

[70] We have carefully considered the evidence, it is apparent that in the present appeal, there was no evidence and there were no circumstances from which it might be inferred that the second appellant must have been acting in concert with the first appellant or vice versa in pursuance of a concerted plan to traffic 38,260g of cannabis on the date, time and place as per the charge. In *Mahbub Shah v Emperor* AIR 1945 PCj118 (PC), Sir Madhavan Nair delivering the decision of the judicial committee, laid down the law in regard to the issue of common intention at p 120 of the report:

> Under the section, the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. To invoke the aid of section 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their

> Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case.

[71] In *Suresh and another v State of Uttar Pradesh* AIR 2001 SC 1344 (SC), Sethi J spoke, at p 1351, about common intention in this way:

> 37 Section 34 of the Indian Penal Code recognises the principle of vicarious liability in the criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the commonsense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gainsaying that a common intention pre-supposes prior concert, which requires a pre-arranged plan of the accused participating in an offence. Such a pre-concert or pre-planning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on a spur of moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case.

[72] In *Hari Ram v State of Uttar Pradesh* [2004] 3 LRI 523 (SC), Arijit Pasayat J speaking for the Indian Supreme Court had this to say about common intention:

> 13 The Section does not say 'the common intention of all', nor does it say 'an intention common to ail'. Under the provisions of s 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in s 34, when an accused is convicted under s 302 read with s 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed in *Ch Pulla Reddy & Ors v State of Andhra Pradesh* (AIR 1993 SC 1899); 1993 Indlaw SC 1030, s 34 is applicable even if no injury has been caused by the particular accused himself. For applying s 34 it is not necessary to show some overt act on the part of the accused.

[73] Common intention for trafficking is not proven as there was no evidence or insufficient evidence to draw any inference of a pre-arranged plan. The mere fact that the second appellant was found as a passenger in the Proton

Wira motorcar is insufficient to draw an inference of a common intention to traffic the drugs that were found in the boot of the said motorcar.

[74] The second appellant was a mere passenger of a Proton Wira motorcar used by Hj Musa as a 'kereta sapu' and, at the material time, it was driven by the first appellant to transport the second appellant at the behest of Hj Musa from Kampung Limau Manis, Putrajaya to Segambut, Kuala Lumpur for a fee of RM60.

[75] Evidence emanating from SP4, the mother of the first appellant, showed that there were others who had access to the Proton Wira motorcar.

[76] The first appellant took the Proton Wira motorcar on 31 July 2005 at 9.45pm (night) and he was arrested on 1 August 2005 at 12 midnight. A mere two hours and 15 minutes. The prosecution did not challenge this version. The journey to Segambut, Kuala Lumpur took quite a while. The first appellant stopped several times to eat, to top up the petrol, and to ease his bladder and wash his face just before entering the Jalan Duta toll. And there was no evidence to show that the first appellant or even the second appellant had opened the boot of the said motorcar or had put those drugs there.

[77] The sum total of it all would be this. There was no evidence that both the appellants were acting in concert pursuant to any pre-arranged plan. There was no evidence that common intention surfaced on the spur of the moment.

[78] The handphones of both the appellants were seized. There was no evidence that the second appellant had contacted the first appellant. It was put to the second appellant, in cross-examination, that on 31 July 2005 he contacted the first appellant and not Hj Musa but it was disagreed by the second appellant. The second appellant's testimony that he had contacted Hj Musa to pick him up and send him to Segambut, Kuala Lumpur could be negated or rebutted by further investigation on the handphones of both the appellants. Sadly, this was not done.

[79] The prosecution relied on the conduct of the first appellant in reversing the Proton Wira motorcar that collided into the motorcar that Chief Inspector Balasubramaniam was seated as a passanger as proof that the first appellant had knowledge of the drugs in the boot of the said motorcar. But this piece of evidence was challenged when SP6 gave evidence. The first appellant's cross-examination of SP6 through his learned counsel revealed that the first appellant did not, at any time, reverse the Proton Wira motorcar but instead, it was shown, that it was the police car that collided into the motorcar driven by the first appellant. Flowing from the purported flight of the first appellant as well as the attempted flight of the second appellant, the High Court judge held

that both the appellants were in possession of the drugs because they were both inside the Proton Wira motorcar at the material time. But doubts lingered as to whether both the appellants had custody and control or knowledge of the drugs in the boot of the said motorcar. Accessibility of others to the said motorcar negated exclusive possession of the drugs that were found in the boot of the said motorcar. In our judgment, the evidence of SP4 crippled the prosecution's case to such an extent that there was no prima facie case established against both the appellants. Their convictions must be set aside.

SECTION 422 OF THE CPC

[80] The learned deputy public prosecutor in the person of Tengku Amir Zaki bin Tengku Hj Abdul Rahman invited us to save the evidence of SP3 — the government chemist, by citing s 422 of the CPC. We declined the invitation.

[81] As demonstrated earlier, there was an improper admission of SP3's evidence. That being the case, there was no evidence that the exhibits were cannabis, a dangerous drug within the meaning of s 2 of the DDA.

THE PROVISO TO S 60(1) OF THE COURTS OF JUDICATURE ACT 1964 ('CJA')

[82] We asked whether we should invoke the proviso to s 60(1) of the CJA. Mr Hisyam Teh Poh Teik acknowledged that this court has the power to do so but he reminded us that it is not an appropriate case to do so because the charge has not been proven by the prosecution. He pointed out that there is a complete failure of justice. He submitted that, on the facts, the evidence is not overwhelming against both the appellants.

[83] We agreed with learned counsel. The appellants, on the available evidence, are innocent. We have doubts as to their guilt and their convictions should not stand (*Juraimi bin Husin v Public Prosecutor*, *Juraimi bin Husin v PP; Mohd Affandi bin Abdul Rahman & Anor v Public Prosecutor* [1998] 1 MLJ 537 (CA)).

CONCLUSION

[84] For the reasons alluded to in this judgment, we unanimously allowed

the appeals of both the appellants. We set aside the decision of the High Court judge. We quashed the convictions and sentences of both the appellants. We acquitted and discharged them accordingly.

Appeals allowed, convictions and sentences quashed and appellants acquitted and discharged.

Reported by Ashok Kumar